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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GLENN ANTHONY DAVIS, Defendant and Appellant.	B158260 (Los Angeles County Super. Ct. No. SA039138)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elden S. Fox, Judge. Modified, and, as so modified, affirmed.

Anthony J. Dain, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General and Louis W. Karlin, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Glenn Anthony Davis appeals from the judgment entered following a jury trial that resulted in his convictions for three counts of false imprisonment by violence or menace; seven counts of second degree robbery; seven counts of assault with a semiautomatic firearm; conspiracy to commit second degree robbery; and conspiracy to commit false imprisonment. Davis was sentenced to a prison term of 15 years, eight months.

Davis contends: (1) the trial court prejudicially erred by admitting evidence of a co-defendant's gang affiliation; (2) the trial court erred by denying his motion for a mistrial; (3) the prosecutor committed prejudicial misconduct during closing argument; (4) instruction with CALJIC No. 17.41.1 violated his constitutional rights; and (5) a one-year principal-armed enhancement must be stricken. We agree that the one-year principal armed enhancement must be stricken. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

Viewed in accordance with the usual rules of appellate review (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11), the evidence relevant to the issues on appeal established that Davis, along with several other men, robbed the XIV Karats jewelry store located on South Beverly Drive in Beverly Hills on May 24, 2000, at approximately 8:30 a.m. On that date, XIV Karats manager and co-owner Ronald Rosenblum unlocked the premises, disarmed the alarm systems, and unlocked the vault and safes located inside. Employees Jamie Hayes, Daryn Duff, Kolet Itach, Irma Morales, and Jose Montiel prepared for business in the store. Security guards Charles Wolsic and Melvin Grace remained downstairs in the lobby.

On his way into XIV Karats, Grace had noticed Wright and Davis as they passed him on the sidewalk. Wright was wearing a red shirt with a tropical or Hawaiian print. As Grace and Wolsic waited in the lobby, Davis and Wright entered the building. Wright pulled a semiautomatic handgun from his shirt and said, "Okay. This is the jack." Wright and Davis were joined by two other robbers. The robbers bound the guards with duct tape and placed them in the elevator. When Hayes entered the lobby to investigate

why the elevator was not responding, he, too, was bound and placed in the elevator. When the elevator reached the second floor, the robbers accosted and bound Rosenblum. They forced him, as well as the guards and Hayes, to lie face down on the floor in front of the elevator.

On Wright's order, one of the robbers went to the room where the store's surveillance cameras were kept and, with Hayes's help, removed the store's surveillance videotapes. A second robber went toward the vault, located at the other end of the jewelry showroom. Wright and Davis accosted Morales and pointed their guns at her while she was placing jewelry in a showroom display case. Davis forced her, at gunpoint, to lie on the floor of a nearby office. Wright, meanwhile, accosted Itach and Duff and forced them, also at gunpoint, to lie on the floor of the same office as Morales.

During the robbery, Wright used a walkie talkie to communicate with someone outside the building. The voice on the walkie talkie made comments and gave instructions that suggested familiarity with XIV Karats's personnel, premises and procedures. Wright asked XIV Karats employees for the key to the "middle safe," the only safe used to hold cash and loose diamonds. He also asked for the man who drove "the Black Mercedes Benz." Rosenblum drove such a vehicle and was the only person at the store who had a key to the "middle safe." Co-defendant Jenkins had been a XIV Karats security guard prior to the robbery.

Eventually security guard Dennis Edinbyrd arrived on the scene. After observing a video monitor showing events inside the store, Edinbyrd concluded that a robbery was in progress, pressed an alarm button, telephoned 9-1-1, and ordered other employees who had arrived out of the lobby. Edinbyrd saw one of the robbers exit the stairwell, enter a blue Chevrolet Celebrity parked on South Beverly Drive, start the car, and wait. Two more men ran from the stairwell, followed by two others. The car then drove away, carrying a total of five men.

The robbers fled with jewelry valued at approximately $750,000.

Davis's palm print was discovered on one of the jewelry showcases. Wright's right thumb print was discovered on a jewelry tray in the store's vault area. He was

arrested approximately two weeks after the robbery, carrying $1,788 and a key to a room at the Why Tell Motel. A search of that room revealed a .9-millimeter handgun and a red Hawaiian shirt.

Evidence presented by the People suggested co-defendant Livingston had purchased the getaway vehicle approximately one week before the robbery. A search of Livingston's residence revealed over 200 pieces of jewelry with XIV Karats tags still attached, as well as approximately $7,300 in cash. Other evidence, including a videotape and photographs, were found in Jenkins's residence. While intoxicated, Jenkins had informed his ex-girlfriend that he had had "something to do" with the XIV Karats robbery.

2. *Procedure.*

Trial was by jury. Davis was convicted of three counts of false imprisonment by violence or menace (Pen. Code, § 236),[1] lesser included offenses of kidnapping to commit robbery; seven counts of second degree robbery (§ 211); seven counts of assault with a semiautomatic firearm (§ 245, subd. (b)); conspiracy to commit second degree robbery (§ 182, subd. (a)(1)); and conspiracy to commit false imprisonment. The jury found true allegations that a principal was armed during commission of the false imprisonments, robberies, and conspiracies (§ 12022, subd. (a)(1)), and that those offenses involved the theft of over $100,000. The trial court denied Davis's motion for a new trial. It sentenced Davis to a term of 15 years, 8 months in prison, to run concurrently with Davis's life without possibility of parole sentence imposed in an unrelated case. It also imposed restitution and parole revocation fines. Davis appeals.

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[1] All further undesignated statutory references are to the Penal Code.

DISCUSSION

1. *Admission of gang evidence.*

a. *Additional facts.*

Prior to trial, the trial court made a preliminary ruling excluding evidence of the defendants' gang affiliations after the prosecutor represented that she did not intend to offer such evidence.

The People presented evidence that co-defendant Trayveon Livingston purchased the robbers' getaway vehicle, a Chevrolet Celebrity, approximately one week before the crimes, from Carlos Romo. Romo testified that a "black guy" named "Tray," who drove a red Impala with the license plate "1 DUBBZ," purchased the Celebrity from him. To complete the sale of the car, Romo followed Tray to a house at 2411 Budlong Avenue, which was established as Livingston's residence through other evidence.

Before trial, Romo had unequivocally identified Livingston as the purchaser of the Celebrity from a six-pack photographic lineup, but had refused to sign anything evidencing the identification. At trial, Romo testified that he did not recognize any of the persons in the photographic lineup and denied that the person to whom he sold the car was in the courtroom. Romo admitted he had told the prosecutor and a detective that "people in the neighborhood" had threatened him with harm if he testified, but claimed he falsely made such statements because he did not wish to testify.

At a sidebar conference, the prosecutor represented that Romo had previously stated he knew Livingston and was afraid of him because he was a Rolling Twenties Blood gang member. The trial court denied the prosecutor's request to elicit this testimony from Romo.

During direct examination, Detective Thomas Linehan testified that Romo had identified Livingston in the photographic lineup, but would not sign a form evidencing the identification because "[h]e was afraid to . . . . He didn't want to go to court." During cross-examination, Livingston's counsel elicited from Linehan an admission that the police report did not state that Romo said he was afraid to testify. At a sidebar conference, the prosecutor explained that the police report contained a statement that

Romo knew Livingston was a Blood gang member. The trial court reviewed the relevant portion of the police report and agreed that the information contained therein could give rise to an implication that Romo was afraid of retribution due to Livingston's perceived gang membership. The trial court nonetheless directed the prosecutor to avoid mention of the gang affiliation, but allowed her to ask Linehan whether the police report referenced Romo's concerns about safety.

During his case, Livingston presented evidence through his aunt, Etoria Munford, and his girlfriend, Adriana Velarde, suggesting that his friend Peter Kelly was known as Tray-K, sometimes drove Livingston's Impala, and often stayed at or visited the Budlong Avenue house.

After another sidebar conference, the trial court allowed the prosecutor to question Munford regarding Livingston's gang membership. In an attempt to elicit such testimony, the prosecutor asked whether Livingston was a gang member, whether the Budlong house was a gang "hangout," whether Kelly was a member of the same gang, whether Livingston was especially proud of his Impala because of its red color, whether Livingston and others were wearing gang attire in a photograph, and whether Livingston had told Munford that he was involved in the XIV Karats robbery to help the gang. However, Munford repeatedly denied that Livingston was a gang member. Munford admitted that in one photograph, Livingston appeared to be "flashing" a gang sign, and that she "might have had a suspicion" that he was a gang member, but "did not know that."

During the People's rebuttal case Detective Linehan testified that when Romo selected Livingston's photograph, Romo stated he was afraid of Livingston because Livingston was a Rolling Twenties Blood gang member. Romo, who was afraid for his life, did not wish to testify or sign forms identifying Livingston because he was afraid of gang reprisals.

The defendants moved for a mistrial on the ground prejudicial gang evidence had been improperly admitted. The trial court denied the motion. It explained that Livingston had attempted to show Kelly was actually the purchaser of the car, and Romo

had misidentified him. The trial court opined, "That issue in regard to Mr. Romo's testimony, I believe, is rather critical, and I believe the people were entitled at that point in time to explain his lack of identification if, in fact, it was based on his belief and some affiliation or association." It concluded that the questioning regarding gang affiliation had been properly limited to Livingston on the issue of misidentification, minimizing the possibility of prejudice.

The trial court instructed the jury that the evidence of gang affiliation was admitted solely against Livingston, and not the other defendants.[2] It further instructed: "Certain evidence regarding alleged gang affiliation was admitted for a limited purpose. [¶] This evidence was admitted for the purpose of explaining the facts and circumstances surrounding the identification or lack of identification of defendant Trayveon Livingston by witness Carlos Romo. Such evidence is not to be considered by you for the truth of that statement and is not to be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider this evidence for any purpose except the limited purpose for which it was admitted."

b. *The trial court did not err by admitting evidence that a witness was afraid to testify because of a co-defendant's purported gang affiliation.*

Davis argues the trial court improperly allowed the prosecutor to question Munford regarding Livingston's purported gang membership and improperly admitted Linehan's testimony that Romo believed Livingston was a gang member. He complains that because the evidence of Livingston's purported gang membership was only tangentially related to any issue in the case, the evidence and questioning were unduly prejudicial and should have been excluded under Evidence Code section 352. We disagree.

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[2] The trial court instructed, "Evidence has been admitted against defendant Trayveon Livingston regarding alleged gang affiliation, and not admitted against the others. [¶] You are instructed that this evidence cannot be considered by you against the other defendants. Do not consider this evidence against the other defendants."

Gang evidence is not admissible if introduced only to "show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense. [Citations.]" (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449; cf. *People v. Jordan* (2003) 108 Cal.App.4th 349, 365.) However, such evidence is admissible if it is relevant to issues in the case, is not more prejudicial than probative, and is not cumulative. (Evid. Code, § 352; *People v. Ruiz* (1998) 62 Cal.App.4th 234, 240; Evid. Code, §§ 210, 780.) Even if gang evidence is relevant, it may have a highly inflammatory impact on the jury. Thus, "trial courts should carefully scrutinize such evidence before admitting it. [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Gurule* (2002) 28 Cal.4th 557, 653.)

A trial court's admission of evidence, including evidence related to a defendant's gang membership, is reviewed for abuse of discretion. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1118; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1519.) "The admission of gang evidence over an Evidence Code section 352 objection will not be disturbed on appeal unless the trial court's decision exceeds the bounds of reason." (*People v. Olguin, supra,* at p. 1369.)

We conclude the trial court did not abuse its discretion. First, the trial court allowed limited gang evidence for a legitimate purpose: to show the basis for Romo's fear and refusal to identify Livingston. (*People v. Sanchez, supra,* 58 Cal.App.4th at pp. 1449-1450; *People v. Olguin, supra,* 31 Cal.App.4th at p. 1368.) Contrary to Davis's argument, Livingston's perceived gang membership was directly related to an important issue in the case: the accuracy of Romo's pretrial identification of Livingston as the man who purchased the getaway car. We are not persuaded by Davis's argument that, because Linehan had already testified Romo was afraid to identify Livingston, "the reason why he was afraid was of very little importance." To the contrary, whether there was a legitimate reason for Romo's purported fear was crucial to a fair evaluation of his testimony.

Contrary to Davis's argument, the trial court did not improperly justify admission of the evidence on a flawed theory that the defense had "opened the door" to such evidence. Davis cites *People v. Johnson* (1964) 229 Cal.App.2d 162, 169-170, in support

of his argument. There, the court stated, " '[T]he argument that appellant's counsel "opened the gates" is unavailing. . . . "An error that is prejudicial is no less so because it results from a lack of knowledge on the part of either counsel or both. Legitimate cross-examination does not extend to matters improperly admitted on direct examination. Failure to object to improper questions on direct examination may not be taken advantage of on cross-examination to elicit immaterial or irrelevant testimony. The so-called 'open the gates' argument is a popular fallacy. 'Questions designed to elicit testimony which is irrelevant to any issue in the case on trial should be excluded by the judge, even though opposing counsel has been allowed, without objection, to introduce evidence upon the subject.' " (*Id.* at pp. 169-170; see also *People v. Wells* (1949) 33 Cal.2d 330, 340, disapproved on other grounds in *People v. Wetmore* (1978) 22 Cal.3d 318, 321; *People v. Parrella* (1958) 158 Cal.App.2d 140, 147; *People v. Gambos* (1970) 5 Cal.App.3d 187, 192 ["By allowing objectionable evidence to go in without objection, the non-objecting party gains no right to the admission of related or additional otherwise inadmissible testimony."].)

The cited authorities, however, do not support the conclusion that the prosecutor's cross-examination of Munford or the admission of Linehan's testimony was error. The prosecutor did not fail to object to improper testimony and then attempt to benefit from that omission by herself attempting to elicit impermissible testimony; instead, she properly attempted to rebut defendant Livingston's properly admitted evidence. As the People point out, "[t]his [was] not a case where the court allowed one party to introduce inadmissible evidence in response to the other party's questionable line of questioning." (Cf. *People v. Steele* (2002) 27 Cal.4th 1230, 1248-1249.)

After Livingston offered evidence suggesting that Romo might have sold the car to Kelly, evidence explaining Romo's failure to identify Livingston in court became more probative. As the probative value of evidence of Livingston's gang affiliation increased, the trial court properly reweighed the probative value of the evidence against its prejudicial effect. (*People v. Jordan, supra,* 108 Cal.App.4th at pp. 365-366 [trial court, which had initially excluded gang evidence, properly allowed the People to elicit gang

evidence on rebuttal, where such evidence became relevant to rebut inferences raised during defendant's portion of the case].) A trial court may properly "conclude the probative value of the gang evidence increased during presentation of the trial to the point where it outweighed the risk of undue prejudice." (*People v. Jordan, supra,* at p. 366.) Here, the trial court's comments indicate it properly balanced the prejudicial effect of the evidence against its probative value.

Second, even assuming arguendo that the trial court erred, any such error was harmless. We evaluate the erroneous admission of gang evidence under the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836, and reverse only if it is reasonably probable that admission of the evidence affected the verdict. (*People v. Champion* (1995) 9 Cal.4th 879, 923; *People v. Jordan, supra,* 108 Cal.App.4th at p. 366; *People v. Malone* (1988) 47 Cal.3d 1, 22; *People v. Felix* (1993) 14 Cal.App.4th 997, 1007-1008.) The evidence actually admitted was minimal, i.e., that Romo was afraid to identify Livingston because he believed Livingston to be a gang member. The jury was explicitly advised that the evidence was not offered for its truth. It was also instructed that the evidence could be considered against Livingston only, a principle that was reiterated in the prosecutor's closing argument.[3] We presume jurors follow the trial court's instructions. (*People v. Waidla* (2000) 22 Cal.4th 690, 725; *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17 ["The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions."]; *People v. Williams* (2000) 79 Cal.App.4th 1157, 1171.) Moreover, there was no direct evidence that the other defendants were gang members. Evidence that Wright visited Livingston's Budlong Avenue house did not establish that Wright or Davis were gang members. Davis's argument --that the series of questions asked of Munford by the prosecutor raised an inference that the prosecutor possessed "other independent

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[3] The prosecutor argued, "That's why the gang stuff is important. It's important because it shows you what Mr. Romo's state of mind was. And by the way, that's the only reason for which you are allowed to consider the gang evidence and it's only allowed to be considered against Mr. Livingston."

evidence" of Livingston's gang affiliation -- fails. The jury was instructed not to assume true any insinuation suggested by a question posed to a witness. (CALJIC No. 1.02.) There is no reasonable likelihood that jurors assumed Davis was a gang member, or used that inference to impermissibly infer guilt.

Moreover, the evidence against Davis was overwhelming. Among other things, he was identified by victims Grace and Rosenblum, as well as by Asmik Aroutunian, a XIV Karats employee who was in the lobby with Edinbyrd and saw the robbers leave the scene. Davis's palm print was found on a XIV Karats display case. The record did not suggest an innocent explanation for his presence in the store.

Davis argues that the jury's acquittal of Livingston on several counts, and its inability to reach a verdict on other counts charged against Livingston, "demonstrates that the jury had a serious problem with the prosecution's case." To the contrary, the jury's failure to convict Livingston is powerful evidence it was *not* prejudiced by the limited evidence of Livingston's gang affiliation. Given that the jury clearly did not use evidence of Romo's belief about Livingston's gang affiliation to convict Livingston, there can be no question the evidence was not prejudicial in regard to the remaining defendants. Therefore, it is not reasonably probable that a more favorable verdict for Davis would have resulted had the challenged evidence and questioning been omitted.

c. *The trial court properly denied Davis's motion for a mistrial.*

Davis argues that even if the gang evidence was admissible against Livingston, the trial court nonetheless erred by denying Davis's motion for a mistrial, because the challenged evidence was prejudicial as to him. We disagree.

A mistrial motion should be granted only when the moving party's chances of receiving a fair trial have been irreparably damaged. (*People v. Ayala* (2000) 23 Cal.4th 225, 283-284.) " ' "Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." [Citation.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1154; *People v. Cox* (2003) 30 Cal.4th 916, 953.) Therefore, we review a trial court's

ruling on whether to grant a mistrial for abuse of discretion. (*People v. Ayala, supra,* at pp. 282-283.)

Here, we have already explained that the admission of the limited gang evidence was not prejudicial to Davis. Therefore, the evidence could not have irreparably damaged his chances of receiving a fair trial, and the trial court properly denied the mistrial motion.

2. *The prosecutor did not commit prejudicial misconduct.*

a. *Additional facts.*

During closing argument, counsel for Livingston pointed out that the prosecutor had questioned Munford about Livingston's gang affiliation, and opined that the prosecutor had attempted to establish Livingston was cheating on his girlfriend. Defense counsel argued, "[T]he prosecution spent time on these two issues, and the reason why they did it is because the prosecutor, herself, does not believe the evidence against my client is so overwhelming. In fact, I will argue -- " The prosecutor interposed an objection, which was overruled. Defense counsel continued by arguing that the evidence against Livingston did not amount to proof beyond a reasonable doubt.

In her closing argument, the prosecutor rebutted defense counsel's remarks as follows: "Now, Mr. Dudley [Livingston's counsel] attacked me personally yesterday to some extent, and so I would like to address the two issues that he raised. First of all, he said, 'the prosecutor doesn't even think that my guy's guilty.' I don't know what planet he got that from. I believe he's really out there. [¶] This case is clear. The evidence shows beyond a reasonable doubt that all these defendants are guilty, and I believe it or I wouldn't be here." Defense counsel did not object. The prosecutor continued by discussing the evidence.

b. *Discussion.*

Davis contends the prosecutor committed prejudicial misconduct "by personally vouching for the appropriateness of guilty verdicts." We disagree.

"The applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A prosecutor's . . . intemperate behavior violates the federal

Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) "We apply a 'reasonable likelihood' standard for reviewing prosecutorial remarks, inquiring whether there is a reasonable likelihood that the jurors misconstrued or misapplied the words in question." (*People v. Roybal* (1998) 19 Cal.4th 481, 514.) We " 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 970; *People v. Gurule, supra,* 28 Cal.4th at p. 657.) The allegedly improper remarks must be viewed in the context of the closing argument as a whole. (*People v. Lucas* (1995) 12 Cal.4th 415, 475.)

Davis has waived this contention by failing to object to the prosecutor's comment at trial. It is well established that to preserve a claim of prosecutorial error for appeal, " ' "the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct." ' [Citations.]" (*People v. Barnett, supra,* 17 Cal.4th at p. 1133; *People v. Hughes* (2002) 27 Cal.4th 287, 392; *People v. Cunningham* (2001) 25 Cal.4th 926, 1000.) This was not the sort of extreme case in which an admonition would have been futile. (*People v. Riel* (2000) 22 Cal.4th 1153, 1212-1213.)

In any event, Davis's contention fails on the merits. There was no pattern of egregious behavior that infected the trial with unfairness, nor did the prosecutor's brief remark involve deceptive or reprehensible methods. Davis is correct that a prosecutor may not personally vouch for the appropriateness of the verdict he or she urges. (*People v. Ayala* (2000) 24 Cal.4th 243, 288.) "[I]t is misconduct for a prosecutor to express a personal belief in the defendant's guilt if there is a substantial danger that the jurors will construe the statement as meaning that the belief is based on information or evidence outside the trial record [citation], but expressions of belief in the defendant's guilt are not

improper if the prosecutor makes clear that the belief is based on the evidence before the jury [citation]." (*People v. Mayfield* (1997) 14 Cal.4th 668, 781-782.) Viewed in context, the prosecutor's remark would have been understood by the jury as merely the prosecutor's opinion *based on the evidence adduced at trial.* Because the prosecutor referenced the evidence presented at trial in virtually the same sentence in which she stated her opinion, there was no danger jurors would have construed her argument to mean her views were based upon information or evidence outside the trial record.

Finally, even assuming that the prosecutor's remark was improper, we may not reverse unless it is reasonably probable that a result more favorable to the defendant would have been obtained in the absence of the misconduct. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1130; *People v. Barnett, supra,* 17 Cal.4th at p. 1133.) As noted above, the evidence against Davis was very strong. In contrast, the prosecutor's reference was brief. (*People v. Kipp, supra,* at p. 1130.) The conduct in the cases cited by Davis, i.e., *People v. Kirkes* (1952) 39 Cal.2d 719, 723-725, and *People v. Bain* (1971) 5 Cal.3d 839, 848-849, was far more egregious than what occurred here.

Moreover, as the United States Supreme Court has noted, when determining whether a prosecutor's improper comment warrants reversal, "the reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo. Thus the import of the evaluation has been that if the prosecutor's remarks were 'invited,' and did no more than respond substantially in order to 'right the scale,' such comments would not warrant reversing a conviction." (*United States v. Young* (1985) 470 U.S. 1, 12-13.) Here, the prosecutor's comment was restrained and offered solely to rebut defense counsel's comments. It was no more than what was needed to "right the scale." As the Supreme Court found in *Young:* "Although it was improper for the prosecutor to express his personal opinion about respondent's guilt, [citations], when viewed in context, the prosecutor's remarks cannot be read as implying that the prosecutor had access to evidence outside the record. The jury surely understood the comment for what it was – a defense of [the prosecutor's] decision and his integrity – in bringing criminal charges on the basis of the very evidence the jury had

heard during the trial." (*United States v. Young, supra,* at p. 19.) Applying these principles, we cannot conclude that a more favorable verdict for Davis would have resulted had the prosecutor not made the sole challenged comment.

3. *The trial court did not prejudicially err by instructing with CALJIC No. 17.41.1.*

Davis next argues that the trial court erred by instructing the jury with CALJIC No. 17.41.1.[4] Davis asserts that CALJIC No. 17.41.1 violated his right to a jury trial, interfered with the jury's power to engage in nullification, chilled freedom of expression during deliberations, and allowed majority jurors to pressure holdout jurors. He urges that use of the instruction amounted to a structural defect in the proceedings, requiring per se reversal.

Davis's claim is meritless.[5] The California Supreme Court held in *People v. Engelman* (2002) 28 Cal.4th 436, that CALJIC No. 17.41.1 "does not infringe upon defendant's federal or state constitutional right to trial by jury or his state constitutional right to a unanimous verdict . . . ." (*Id.* at pp. 439-440.) The court decided that because the instruction could be misunderstood or misused, it is "inadvisable and unnecessary" for trial courts to give it in the future. (*Id.* at p. 445.) Because the jury is duty-bound to follow the trial court's instructions and lacks the right to engage in nullification, the instruction, while inadvisable, does not violate a defendant's constitutional rights. (*Id.* at p. 441.) Accordingly, while trial courts should not give this instruction in the future, we conclude there was no prejudicial error in the instant case.

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[4] That instruction, as provided to the jury, read: "The integrity of a trial requires that jurors at all times during their deliberations conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."

[5] Because we conclude Davis's contention lacks merit, it is unnecessary to address the People's argument that he has waived this argument by failing to object below.

4. *The one-year principal-armed enhancement must be stayed.*

Davis asserts that the trial court erroneously imposed a one-year principal-armed enhancement pursuant to section 12022, subdivision (a)(1) because arming is an element of the offense of assault with a semiautomatic firearm. We agree.

a. *Additional facts.*

The trial court imposed an aggregate sentence of 15 years, 8 months, as follows. It designated count 13, the assault on Grace with a semiautomatic firearm (§ 245, subd. (b)), as the base term, and imposed the high term of nine years. On count 12, conspiracy to commit false imprisonment, it imposed a consecutive sentence of eight months in jail, representing one-third the midterm. On counts 14, 15, 18, and 19, the assaults with a semiautomatic firearm on Wolsic, Hayes, Morales, and Itach respectively, it imposed concurrent sentences of nine years. On counts 16 and 17, the assaults with a semiautomatic firearm on Rosenblum and Duff, it imposed consecutive sentences of two years each, representing one third the midterm. It stayed, pursuant to section 654, sentence on the three false imprisonment and seven robbery convictions, as well as on count 11, conspiracy to commit robbery.[6]

After addressing the terms applicable to all counts, the court stated, "The court does note that the jury did find a principal-armed allegation to be true. The court will add an additional one year to that sentence." The trial court's statement did not specify to which count the principal-armed enhancement corresponded. However, both the court's minute order and the abstract of judgment indicate the enhancement was imposed on count 13, the assault of Grace with a semiautomatic firearm.

b. *Discussion.*

At the time Davis was sentenced, section 12022, subdivision (a)(1), provided in pertinent part: "[A]ny person who is armed with a firearm in the commission or

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[6] When orally pronouncing sentence, the trial court did not address the sentence on count 11. However, the court's minute order reflects that a sentence of five years was imposed on that count and stayed pursuant to section 654. Neither party challenges the sentence reflected in the minute order, we therefore do not address it here.

attempted commission of a felony shall, upon conviction of that felony or attempted felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of one year, *unless the arming is an element of the offense of which he or she was convicted.*" (Italics added.) Section 245, subdivision (b), provides for the punishment of "Any person who commits an assault upon the person of another with a semiautomatic firearm . . . ." Therefore, Davis is correct that under the plain language of the two statutes, the principal-armed enhancement could not have been imposed on count 13, because arming is an element of assault with a semiautomatic firearm. By definition, the crime of assault with a semiautomatic firearm includes as an element the use of a firearm. (Cf. *People v. McGee* (1993) 15 Cal.App.4th 107, 114; *People v. Summersville* (1995) 34 Cal.App.4th 1062, 1069-1070.)

The People, however, argue that the trial court did not actually impose the enhancement on count 13, and the abstract of judgment and minute order are in error. The People suggest that the enhancement was imposed on count 12, conspiracy to commit false imprisonment.

Contrary to the parties' assertions, we are unable to discern from the trial court's remarks whether it intended the enhancement to be imposed on count 13 or on some other count. More to the point, however, the law in effect at the time Davis committed the crimes prohibited imposition of the enhancement on count 12. Davis committed the crimes on May 24, 2000. At that time, section 1170.1 provided that enhancements could not be imposed on subordinate terms for nonviolent felonies, i.e., felonies not defined as violent in section 667.5, subdivision (c).[7] (*People v. Felix* (2000) 22 Cal.4th 651, 655.)

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[7] In 2000, section 1170.1 provided in pertinent part: "The subordinate term for each consecutive offense which is not a 'violent felony,' as defined in subdivision (c) of Section 667.5, shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for an offense that is not a violent felony for which a consecutive term of imprisonment is imposed, *and shall exclude any specific enhancements.*" (Italics added.) Section 1170.1 was amended effective January 1, 2001, to eliminate the distinction between violent and nonviolent felonies for purposes of the

Neither conspiracy nor false imprisonment were defined as violent felonies in section 667.5, subdivision (c), at the time the crimes were committed. Because ex post facto principles prohibit laws which retroactively increase the punishment for criminal acts (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1170-1171), the version of section 1170.1 in effect at the time the crimes were committed governs here. Therefore, Davis is correct that the principal armed enhancement could not properly have been imposed on either count 12 or 13. Accordingly, we order the one year section 12022, subdivision (a)(1) enhancement stricken.

DISPOSITION

The one-year principal-armed enhancement imposed pursuant to section 12022, subdivision (a)(1), is ordered stricken. In all other respects, the judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment and forward a copy to the Department of Corrections.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P.J.

CROSKEY, J.

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imposition of enhancements. (See Stats. 2000, ch. 689, § 1; 3 Witkin & Epstein, Cal. Criminal Law (2003 Supp.) Punishment, § 308(1), p. 87.)